Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

Petitioner,

v.

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974; MICHAEL HOLLAND; DONALD PIERCE ELLIOT SEGAL; JOSEPH STAHL, II

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the lower courts erred on this issue of first impression for this Court by failing to apply a presumption of entitlement to interest on delayed damages under ERISA claims ~~rather than~~ but instead adding a condition that the plaintiff has the burden of proving that the fund acted arbitrarily and capriciously in delaying benefits?**

II. **Whether the lower courts erred in denying class action certification on the basis of the absence of a common issue of law or fact?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated February 11, 2003, was reported at 319 F.3d 612 (2003) (hereinafter Fotta II) and appears at Appendix p. 7A. The trial court's Findings of Fact and Conclusions of Law in the United States District Court for the Western District of Pennsylvania and Order granting judgment in favor of Defendants following a nonjury trial dated March 29, 2001 was not reported and appears at Appendix p. 25A. The lower court's Memorandum denying the Plaintiff's Motion for class certification was not reported and appears at p. 47A.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered February 11, 2003. Rehearing was requested but was denied on March 13, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner filed suit against the Respondents under the provisions of § 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), which provides:

§ 1132. Civil Enforcement

(a) A civil action may be brought--

* * * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * *

STATEMENT OF THE CASE

This is a claim made under the Employment Retirement Security Act of 1974 (ERISA) seeking recovery of interest on pension benefit payments paid Plaintiff Abraham Fotta from the United Mine Workers of America 1974 Pension Trust and seeking class certification for those similarly situated. Fotta is a disabled miner who had to wait nine years to receive his disability payments. Although he has received the delayed payments he has sued the pension fund for the interest that would have accumulated on the delayed payments.

The suit was filed in the United States District Court for the Western District of Pennsylvania on March 27, 1997 and assigned to the Honorable William L. Standish, District Judge who dismissed the case for failure to state a cause of action under ERISA. On appeal to the Third Circuit Court of Appeals, the appeals court reversed and remanded the case on the grounds that §502(a)(3)(B) which gives the courts authority to award equitable relief for ERISA violations, provides a cause of action for interest on delayed pension benefits. Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974, 165 F.3d

209 (3rd Cir. 1998) (Fotta I).

On remand, following a bench trial, the trial court determined that Plaintiff Fotta was not entitled to relief since he failed to show that the delay in payment of the disability was due to any wrongful conduct of the Fund. The court also denied class certification since the commonality requirement of Federal Rule of Civil procedure 23(a) had not been met.

The Third Circuit Court of Appeals affirmed, ruling that interest can be awarded only if there is a showing that the delay was due to wrongdoing on the part of the fund. As noted in the concurring opinion of Senior District Judge Schwarzer, this holding is contrary to those of other circuits, including the Second Circuit in Dunnigan v. Metropolitan Life Ins. Co, 277 F.3d 223 (2d Cir. 2002) and the Seventh Circuit in Clair v. Harris Trust & Savings Bank, 190 F.3d 495 (7th Cir. 1999) which did not require a showing of wrongdoing or bad faith on the part of the fund. After denial of Plaintiff's request for reconsideration or argument en banc, this request for grant of certiorari follows.

STATEMENT OF FACTS

This action arises under Section 302 of the Labor Management Relations Act, 61 Stat. 163, 29 U.S.C. §186(c)(5) and (e). The complaint essentially makes a claim for loss of interest on a back payment for a disability pension that Fotta received from the Defendant as a result of a mining accident while working for United States Steel Mining Company. He had originally been denied the pension; but in 1994, following culmination of a long battle by Mr. Fotta for workers' compensation benefits, he was determined to have been eligible for the pension from July 24, 1984. Although he received lump sum payments for the back

pension benefits, no payment was made for interest on the back payment. Plaintiff Fotta received a lump sum payment of Eighteen Thousand Eight Hundred and Eighty Five dollars ($18,835.00) representing the back payment from September 1, 1985 to November 30, 1993. He later received an additional lump sum payment of One Thousand Nine Hundred and Sixty Five Dollars ($1,965.00) when the effective date of the pension was set at July 23, 1984, the date of the accident. However, despite demand, the Fund has refused to pay interest on the back payment.

Since this appeal is from the decision of the lower court following a non-jury trial, the relevant facts as determined by the court are set forth in its Findings of Fact and Conclusions of Law which are attached to this Brief at page 25A. These are here incorporated as though fully set forth at length. In addition, it is noted that the parties entered into a Joint Stipulation which was part of the Appendix before the Third Circuit at pp. 278a.[1]

While the procedural history associated with processing this disability pension is detailed and lengthy, the material portions for this appeal are relatively limited. More particularly, appellant draws the attention of the Court to the following findings:

> Finding No. 1: That Fotta did verbally report the mine injury promptly, although no accident report was filed. (p. 26A)
>
> Finding No. 11: When the Funds' clinical consultant concluded, on December 30, 1986 that "Based on Mitchell's report I accept that there was an ankle and

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[1] Page numbers followed by lower case letters designate pages of the Appendix filed in the Court of Appeals for the Third Circuit. Page numbers followed by capital letters designate pages of the Appendix attached hereto.

that it aggravated a pre-existing tumor." establishing the causal link. The consultant only expressed reservations concerning the existence of an injury in the mine and recommended obtaining actual medical records to determine what the claimant told the doctor. (p. 31A)

Finding Nos. 12, 13, 14, 15: That Fotta provided medical documentation establishing his prompt and accurate report of a mine injury to two treating doctors. (pp. 31A-33A)

It is noted that these stipulations were not disputed and should be accepted. A summary of the facts surrounding Fotta's claim was also presented regarding the class action.

Concerning the class action, the following facts were presented to the lower court:

The UMW Trust Fund has established extensive procedures for the guidance of their examiners in resolving the question of whether an individual is entitled to pension payments. Additionally, discovery has revealed the existence of a manual outlining these procedures in greater detail. See Lee Depo. pp. 27,28, App. 57a, 58a. As noted by Mr. Lee, the prime role of the examiner is to collect information. pp. 37,38, App. 67a, 68a; see also paragraph 614.3 of the Manual. Under the procedures, the examiner obtains documentation from the Social Security Administration, the coal employer, the claimant, and independent doctors if necessary. Time is expended in gathering this documentation. For example, it could take a year for Social Security to send the documentation. Lee Depo., p. 17, App. 47a. It could take a year or more for the employer to respond. App. 92a-93a. Independent medical information is obtained only following a process whereby there is an established need to make an

expenditure to acquire the data. Additionally, miscellaneous requests for information can be made directly to the claimant as well as requests for authorizations to release information. Under the regulations, the examiner has the responsibility to push this process forward. Once the disability pension is approved, the funds are to be made payable with an effective date retroactively to the month following the date of disability, with some exceptions relative to the payment of sickness and accident benefits. See Paragraph 413.1 of the Manual.

Additionally, there is some delay associated with the internal appeal process. Currently, approximately 50% of the applications are initially approved. Approximately 5% of the disapproved applications are reversed on internal appeal.

The local district offices have a procedure whereby the various claims are time tracked. App. p. 71a, 72a. However, Mr. Lee was unsure as to whether these time tracking records would still be available and was unable to estimate the average or typical delay associated with the processing of a disability pension by his fund. App. 74a.

Mr. Fotta's claim took the following course: His application was received on or about February 7, 1986 with a letter of acknowledgment from the fund dated February 13, 1986. App. 84a, 85a. Mr. Fotta provided authorizations for medical information to be provided by the Social Security Administration. The fund sent a request for employment and accident information to the employer coal company. App. 90a.

The coal employer responded on or about October 2, 1986, a six month delay, indicating that they did not have an accident report. App. 91a. Social security records were received on or about August 13, 1986. App. 93a. The file does not indicate when the

social security request was made by the Fund. App. 94a.

Notes from the examiner indicate that there was a concern about the absence of an injury report as of December 20, 1986. p. 102a. However, the examiner chose to accept Dr. Mitchell's report linking Fotta's ankle injury to the aggravation of a preexisting tumor. App. 105a. The Fund also obtained medical documentation from Dr. Easley following a request that they issued on March 31, 1987. App. 109a. Dr. Easley's report received July 8, 1987 confirmed that Fotta had visited the Doctor on July 24, 1984 with confirmation of the nearly contemporaneous mine injury. App. 107a,108a. However, despite receipt of this information there is correspondence dated September 30, 1987, indicating that the Fund would deny Fotta's application unless proof of a mining injury was forwarded. A letter of denial was sent out on November 18, 1987. App. 113a.

The Fund's regulations indicate that decisions by worker's compensation judges do not bind the fund. However, they may use such decisions as resources to guide them in their own independent evaluation. The Fund received a referee's decision concerning Fotta on October 6, 1986. App. 115a. In the file, Finding of Fact No. 5 has been circled, apparently by the examiner. p. 86. That finding confirmed that Fotta fell off a motor while in the scope of his employment on or about July 23, 1984 injuring his ankle. However, compensation benefits were denied at that level since the referee did not accept Dr. Mitchell's findings regarding the medical causal link. App. 117a,118a.

Fotta processed an appeal through the workers compensation Appeal Board, the Commonwealth Court, and the Pennsylvania Supreme Court. The Pennsylvania Supreme Court reversed the referee's findings and directed that benefits be provided. The Fund eventually reconsidered their decision and

granted Fotta benefits on or about November 1, 1993, effective to July 23, 1984. The fund refused to make any payment regarding interest despite the delay of approximately nine (9) years.

Fotta believed he had established his entitlement to interest on a prima facie basis as a result of the successful prosecution of an appeal to the Third Circuit Court of Appeals. See Fotta v. Trustees of the UMWA Health and Retirement Fund, 165 F.3d 209 (3d Cir.1998). It must be noted that despite the clear ruling by the Third Circuit that pensioners should be entitled to the payment of interest for delayed pension benefits on equitable principles on a prima facie basis, the Fund continued to refuse to make any interest payment for delayed benefits to any beneficiary despite the acknowledgment that benefits must be paid retroactively to the month after date of disability, however long the process takes.

Members of the Plan are on a computer list, at least since 1990. Lee Depo, App. 60a-63a. Each month a benefit check is processed and mailed to each plan member. Occasionally, notices approved by the Trustees are included in the mailing without substantial additional cost. Computer records exist which can identify the effective date of pension benefits. When benefits were first paid can be ascertained by review of chronologically kept financial records. It is estimated that there are approximately 107,000 pension beneficiaries currently on the roles with approximately 9,000 receiving disability pension benefits. If necessary, specific details of each file including dates associated with information requests and examiner decision-making can be retrieved through microfiche records and paper files in storage.

The lower court was presented with a record of defendants' admitted uniform practice of refusing to pay interest on withheld benefits, despite the clear command of the Third Circuit in Fotta I that interest presumptively should be awarded in these

circumstances, and evidence showing that the persons harmed by this standard practice can be readily identified.

Despite the clear language of Fotta I, the Third Circuit appeared to elevate the standard to establish the remedy in Fotta II, ignoring the Fotta I "presumption" of entitlement and requiring a claimant to establish some form of wrongful withholding.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because there is a split between the circuits on the issue of whether a pension beneficiary should be able to obtain interest on delayed benefits without having to show wrongdoing on the part of the pension plan.

The Third Circuit Court panel below ruled that a beneficiary is presumptively entitled to interest on his delayed benefits only if those benefits were wrongfully withheld or wrongfully delayed. See p. 7 of Opinion, p. 13A below.

However, as noted in the concurring opinion, this position is contrary to that set forth by the Second Circuit in Dunnigan v. Metropolitan Life Ins. Co., 277 F.3d 223 (2nd Cir. 2002) and that of the Seventh Circuit in Clair v. Harris Trust & Savings Bank, 190 F.3d 495 (7th Cir. 1999). It also appears to be contrary to the Third Circuit's earlier ruling in Fotta I, supra, where the appellate court stated:

> We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of ERISA, irrespective of whether the beneficiary also seeks to recover unpaid

> benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion. And, like other equitable remedies, it is subject to equitable defenses such as laches, an issue the district court did not consider as it dismissed the complaint on motion. As this case will be remanded for the district court to exercise its discretion, we note that this court has held in other contexts that there is a presumption in favor of awarding interest. See Brock v. Richardson, 812 F.2d 121, 127 (3d Cir. 1997) (holding that award of pre-judgment and post-judgment interest is presumptively granted in backpay cases under the FLSA). In Stroh Container Co.[v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir. 1986)], the Eighth Circuit applied that presumption in an ERISA case, stating that interest "should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable." 783 F.2d at 750. That statement was quoted approvingly by this court in Anthuis [v. Colt Industries Operating Corp., 971 F.2d 999]. 971 F.2d at 1010. **We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed.** (Emphasis added).

165 F.3d. at 214.

In Fotta I, therefore, the presumption was not conditioned on any wrongdoing by the fund, and the Second Circuit cited the Third Circuit as being one who, like them, had held that there was no requirement to show bad faith or wrongdoing on the part of the fund in order to obtain interest. Dunnigan, 277 F.3d at 229-30.

The policy rationale for this position is clear. If the beneficiary was entitled to the benefits, during the period of delay

the fund had the use and value of the money. As noted in Fotta I,

> A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as a result of ERISA litigation. Unjust enrichment principles apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary.

165 F.2d. at 212.

The appeals court further noted:

> As we noted above, payment for the time value of money, when appropriate, is an implicit term of the underlying contractual obligation.

Id. at 214.

Finally, the appeals court had linked its earlier decision to an attempt to effectuate the purposes behind ERISA:

> Rather, we effectuate ERISA's objectives by recognizing, under principles of equity, that beneficiaries should be fully compensated and that any unjust enrichment of plans at beneficiary expense should be avoided.

Id. at 214.

The concurring opinion in Fotta II succinctly summarized the rationale supporting the view that arbitrary conduct is not required to support a cause of action for interest in delayed benefits:

Thus, wrongfulness is an element of the beneficiary's claim only in the sense that the plan's withholding of his money is wrongful in unjustly enriching the plan and depriving the beneficiary. That the court did not intend to condition the cause of action to recover interest on delayed benefits upon proof of a further violation of the plan or of ERISA is confirmed by the court's statement of its rationale:

> The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns animating our decisions in Schake [v. Colt Industries, 960F.2d 1187 (3d Cir. 1992)] and Anthuis - viz., making the claimant whole and preventing unjust enrichment - are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.
>
> Unjust enrichment principles also apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary.

165 F.3d at 212.

Fotta II, p. 12, p. 18A.

The concurring opinion also noted the rationale of the Second Circuit:

> A case squarely in point not cited by the majority is Dunnigan v. Metropolitan Life Ins. Co., 277 F.3d 223 (2d Cir. 2002). Dunnigan sued on her own behalf and on behalf of a class of similarly situated beneficiaries of MetLife's ERISA plan to recover interest on benefits paid subsequent to the date when the participant was entitled to receive payment. The district court dismissed the action for failure to allege bad faith on the part of MetLife. The court of appeals reversed. It held first that interest may be recovered under §502(a)(3)(B) "[w1hen benefits are paid only after the date on which the beneficiary was entitled to receive them ... [because] the beneficiary has not received the full value of what was promised and, to the same degree, the plan has realized an unjust enrichment (assuming the lateness was unjustified)." 277 F.2d at 229. It then held that no showing of bad faith is required, stating:
>
> > The opinions of the Third and Seventh Circuits have recognized that interest can be appropriate, equitable "make whole" relief under §502(a)(3)(B), without any requirement that a plaintiff allege or prove bad faith on the part of the defendant. See Clair v. Harris Trust & Savings Bank, 190 F.3d 495, 498-499 (7th Cir. 1999) .... Fotta v. Trustees of the United Mine Workers, 165 F.3d 209, 213 (3d Cir. 1998)....
>
> 277 F.3d 229-30. The court went on to state:

> Dunnigan's complaint alleges that she was entitled to disability benefits, and that the payment of those benefits was delayed nearly five years .... [I]t asserts that payment of her benefits was unreasonably delayed and made long after she was entitled to receive them. Such a delay enriches the fiduciary at the expense of the beneficiary. Unless such a delay is justified, we see no reason why it does not constitute a breach of fiduciary duty.

277 F.3d at 230.

pp. 13-14 of Opinion, pp. 19A-20A.

Support for the Plaintiff's position also came from the Seventh Circuit, as noted by the concurrence:

> The majority also cites Clair v. Harris Trust & Savings Bank, 190 F.3d 495 (7th Cir. 1999), yet that case lends no support to its position. While the case was ultimately decided on the merits of the beneficiaries' claims, it had this to say about their entitlement to interest on delayed ERISA benefits:
>
> > The defendants' position would have the odd implication that if the settlement date were June 30, 1990, and the bank did not cut a check to the retiring employee until July 1, 1991, the employee would have no redress, since he would have received his full plan benefits, albeit ten months after the last date on which he was entitled to receive them under the terms of the plan. The violation of the plan would be plain, but there would be no remedy.

190 F.3d at 498 (emphasis added).

p. 14 of the Opinion; p. 20A.

The concurring opinion also noted that the apparent opposing view of the Eighth Circuit was based upon questionable rationale:

> Only one case appears to be in agreement with the majority. In Jackson v. Fortis Benefits Ins. Co., 245 F.3d 748, 750 (8th Cir. 2001), the court affirmed the denial of interest on delayed benefit payments, holding that "a showing [is required] that the plan was breached before interest on the back payments may be awarded under ERISA." It reached that decision on the authority of Clair, Holmes and Fotta I and Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981). As the foregoing discussion shows, Clair, Holmes and Fotta I do not support the court's holding; those cases stand for the proposition that an unjustified delay in payment of benefits constitutes a violation of the plan entitling beneficiaries to claim interest. And in Dependahl, the Eighth Circuit awarded prejudgment interest, not on the ground that an ERISA violation had been proved (which was necessarily true since plaintiffs had obtained judgment) but on equitable grounds. Quoting from Hodgson v. American Can Co. , 440 F.2d 916, 922 (8th Cir. 1971), the court said, "From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use." It continued:
>
> We believe these same considerations should be

> followed in an award of prejudgment interest with regard to an ERISA violation. The former executives [plaintiffs] have been denied their contractual severance benefits for a period of approximately four years before final judgment was rendered. Falstaff has continued to have the use of this money. Furthermore, the exact amount of the liability on the plans was never in issue. The only question was whether the employee benefit plan was binding in light of the "just cause" exception. Under these circumstances, an award of prejudgment interest is necessary in order that the plan participants obtain "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B).

653 F.2d 1218. Upon analysis, therefore, Fortis provides scant support for the majority's position.

pp. 14-15 of Opinion, pp. 20A-21A.

The majority opinion in this case ("Fotta II") has completely cut back the rationale and legal standard put forward by the opinion in Fotta I. As pointed out by the concurring opinion in Fotta II, a plaintiff seeking interest on delayed pension benefits should receive a legal presumption of entitlement to the interest. Rather than adhering to this standard, the majority in Fotta II has dramatically and drastically reversed the presumption and imposed the high legal standard that a plaintiff would need to prove that pension fund delays are the result of wrongful or arbitrary conduct on the part of the fund. This legal standard effectively destroys the legal remedy for interest since a plaintiff is now forced to conduct a full litigation in the hope of establishing wrongful conduct under circumstances where the likely cost of litigation for all parties will greatly exceed typical interest claims. Under the Fotta I presumption, a much

more modest proceeding would be envisioned, with the plaintiff relying upon presumptive entitlement with the Fund given an opportunity to demonstrate facts suggesting that the grant of interest would be inequitable.

This change of standard and the apparent departure from a equitable presumption in favor of the grant of interest on delayed benefits to a *de facto* policy and standard which eliminates any effective remedy for interest, adopted by Judges Roth and Alito, appears to be at odds with the standard adopted by Judges Sloviter and Scirica (in Fotta I) as well as Judge Schwarzer, sitting by designation as reflected in his concurring opinion in Fotta II.

In view of this apparent split among the Judges, it is respectfully submitted that this Court's consideration is warranted before the rationale in Fotta I is considered implicitly overruled.

This is especially so since this difference of opinion concerning the appropriate legal standard is also reflected in a split of authority among the circuits. As noted in the concurring opinion, cases which hold that there is no bad faith requirement in order to avoid unjust enrichment include Dunnigan, supra, Clair, supra, and Fotta I. Further, as noted by the concurring opinion, an opposing case is Jackson v. Fortis Benefits Ins. Co., supra. It is respectfully submitted that this split of authority requires resolution by the United States Supreme Court.

A recent case, published after Fotta II, demonstrates the danger of allowing the absence of guidance among the circuits to continue. The Eleventh Circuit has sought to deny consideration of interest on delayed benefits entirely. In Flint v. ABB, Inc., 2003 U.S.App. LEXIS 14575 (11th Cir. 2003), the court suggested without holding that the award of interest would be a legal remedy rather than an equitable remedy and hence beyond the purview of

the available ERISA remedies. This severe retrenchment in the developing law was premised upon that circuit's view of this Court's decision in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 151 L.Ed.2d 635, 122 S.Ct. 708 (2002):

> Several circuit courts of appeals--speaking in terms of a fiduciary's "unjust enrichment" (rather than its "wrongful enrichment")-- have held that interest payments on delayed benefits may, in some circumstances, constitute "other equitable relief" within the meaning of § 502(a)(3)(B). See, e.g., Dunnigan v. Metro. Life Ins. Co., 277 F.3d 223, 229-30 (2d Cir. 2002); Jackson v. Fortis Benefits Ins. Co., 245 F.3d 748, 749-50 (8th Cir. 20011; Clair, 190 F.3d at 498-99; Fotta v. Trustees of the United Mine Workers of Am., 165 F.3d 209, 213 (3d Cir. 1998). Most of these cases, however, were decided before Great-West Life &Annuity Insurance Co. v. Knudson, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), in which the Supreme Court's interpretation of "appropriate equitable relief' was more narrow than the interpretations found in previous decisions by the circuit courts of appeals. The Court instructed that, in determining whether relief "is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)) remains dependent on the nature of the relief sought," and the Court resisted plaintiffs' attempt to characterize their claim for enforcement of a reimbursement provision of an ERISA plan as one for equitable restitution. Id. The Court's decision in Knudson, therefore, raises the question whether § 502 (a)(3) ever allows an award of interest for delayed benefits or whether such a claim is an impermissible attempt to dress an essentially legal claim in the language of equity.
>
> This case threatens to disrupt the entire debate regarding the

applicable standard of proof and appears to be based upon a most unfortunate and unsupported reading of Knudson, which clearly did not address the issue presented here.

Knudson itself was a 5-4 decision. Even the majority opinion in Knudson conceded that one of the forms of relief here sought (i.e., the disgorgement of profits earned on the funds held by the previous funds) clearly would be equitable in nature:

> fn2. There is a limited exception for an accounting of profits, a form of equitable restitution that is not at issue in this case. If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered. See 1 Dobbs § 4.3(1), at 588; id.§ 4.3(5)

534 U.S. at 214.

In a society so strongly oriented to the time value of money, where large segments of the middle class are mired in credit card debt as financial institutions are permitted to charge high rates of interest even during periods of near deflation, it is hard to understand the fairness in denying minimal legal interest rates to delayed pension benefits. These benefits are allocated to the most vulnerable members of our society - the aged, the disabled, widows and minors. Since the pension funds unquestionably have the use of the pensioner's money while the process of determining eligibility grinds on, why not release these profits or a similar interest rate to the affected parties? There should be at least some institutional pressure upon the fund to complete, rather than obstruct, the process. As here, the fund knows exactly how to procure the necessary information. It is relatively easy to find some

minor paperwork glitch to deny payment. The vast majority of pensioners will never consult counsel and lack the sophistication to insure perfect compliance with the procedures. A single rule, presumed interest on delayed payments, will end the need for complex litigation and fairly compensate the average individual.

The lower courts apparently fear that pension funds could be adversely impacted if a simple rule were announced that would lend itself to easy class action certification. Clearly, if a uniform simple rule were announced by this Court, issues of commonality, relied upon below to deny the instant class, would disappear. In the short run, until the funds adjusted their administrative procedures to the rule, class actions would be a possibility to compensate for the large number of relatively small claims.

While fairly compensating hard-pressed pensioners, it should not unfairly threaten the funds. If the normal legal interest rate threatens the solvency of a fund, it could simple be asked to disgorge the profits, as is requested here. If there are no profits, there would be nothing to disgorge. If there are profits, they rightfully belong to the pensioners and should not threaten the principal solvency of the fund. In any event, solvency could be raised as a defense to influence the lower court's award, if necessary. Solvency has never been an issue in the record of the instant case.

Finally, on a factual basis, it is noted that the concurring opinion in Fotta II, although acknowledging that the District Court applied the wrong legal standard in denying interest, presumably would have exercised its equitable discretion against the plaintiff, holding the plaintiff responsible for the delay. The concurring opinion relied upon the lower court's rationale in its conclusion of law No. 34, finding the delay in payment was due to plaintiff's failure to provide the fund with an accident report, an employer's

statement or worker's compensation records to establish the occurrence of a mine accident. However, this is inconsistent with the trial court's finding at paragraph 23 of its findings of fact. That finding specifically found that the reason why the Fund determined to reverse its earlier denial of the plaintiff's disability pension was because it had now been able "to establish the existence of a causal link between the mining accident and the disabling diagnosis. The record indicates that although this tumor preexisted the injury, it was asymptomatic and that the trauma from the injury caused this undiagnosed tumor to grow rapidly, causing eventual total disability." See 39A. Since the acknowledged ground for reversing its decision had nothing to do with independent documents establishing the mine accident, but rather dealt solely with the medical causation issue, it is clear that the lower court's conclusion that Fotta's inability to provide a nonexistent accident report or other similar records is not supported by the record and cannot fairly be relied upon to affirm an implied exercise of discretion.

This finding is even more clear in light of the lower court's finding that Fotta did in fact report the accident when it happened. See Finding of Fact No.1, p. 26A.

The majority opinion also criticized Fotta for failing to appeal from the administrative findings. However, Fotta had no further information to offer at the time. The suggestion that the fund reversed itself upon the discovery of a second report referred to in the Pennsylvania Supreme Court ruling strains credulity. As noted earlier, the fund had an internal memo making it clear that it did not doubt medical causation, but doubted the existence of the mine accident. Its later reversal, six years later, was based upon no further information at that point. There was no further information to be had. There was nothing submitted on the crucial issue to an administrative board. Fotta had no further obligation since with no

additional evidence, it would have been futile.

However, the record in this case clearly shows how easy it is for a fund to avoid responsibility in the absence of a clear administrative rule. It seems that under the current state of the law there is no effective way to claim interest on delayed benefits.

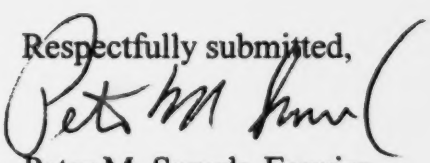
This Court is urged to take a strong and clear position one way or the other. If interest or disgorged profits should be paid on delayed pension benefits, then establish a clear, workable and easily applied rule. If not, then the Court's opinion would do a service to frustrated litigants by simply abolishing the cause of action.

In any event, the Court is urged to grant certiorari to avoid the unfolding judicial anarchy on this issue of substantial importance to the average American pensioner.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



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